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IN THE
COURT OF APPEALS OF INDIANA

KEVIN CAREY,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0512-PC-1220
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven J. Rubick, Commissioner
The Honorable Patricia J. Gifford, Judge
Cause No. 49G04-9906-PC-102291

September 13, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Kevin Carey appeals the denial of his petition for post-conviction relief ("PCR") that challenged his convictions for attempted voluntary manslaughter[1] as a Class A felony and criminal recklessness,[2] a Class D felony. On appeal, we consolidate and restate Carey's issues as follows:

I. Whether trial counsel provided ineffective assistance when he tendered an instruction on attempted voluntary manslaughter, failed to object to the omission of specific intent as a required element in the jury instructions on attempted murder and attempted voluntary manslaughter, and failed to argue sudden heat as a mitigator at sentencing.

II. Whether appellate counsel provided ineffective assistance when she failed to raise these trial counsel errors on appeal.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts set out in Carey's direct appeal are as follows:

> On June 8, 1999, Michael Allen (Allen) went to his grandparents' house at 2175 White Avenue in response to a call from his cousin, Derrick Kay (Kay). When Allen got there, Carey and two other men were standing in the street. Allen and Carey argued over an earlier confrontation involving Kay, and a fistfight ensued between Allen and Carey. Several people witnessed the fight and both parties ended up on the ground. Although there is conflicting testimony as to who threatened whom, it appears that Carey threatened Allen by saying, "I swear on my daughter, I'm going to kill you." (R. 224, 260). One witness, Denise Vaden testified that she heard Carey say, "Okay, I'm going to get my gun" and "That's okay. We're going to see who's the bitch now." (R. 170-71, 176).

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[1] *See* IC 35-41-5-1; IC 35-42-1-3. The jury returned a verdict of attempted voluntary manslaughter as an inherently included offense of attempted murder. *See* IC 35-42-1-1.

[2] *See* IC 35-42-2-2. Because Carey does not specifically raise his criminal recklessness conviction, we address only his attempted voluntary manslaughter conviction.

> After the fistfight, people that were present and relatives pulled Carey down the street towards his home, and Allen and Kay left. Carey went into his home to wash blood off of himself from the fight. Allen went to the home of Arlene Hill (Hill) at 2173 Sugar Grove for a glass of water. Approximately ten to fifteen minutes later, several witnesses testified that Carey approached Allen with a gun. When Carey was about twenty to twenty-five feet from Allen, he pointed the gun at Allen and began shooting. Allen sustained seven gunshot wounds, including injuries to his stomach, elbow, and both of his legs. At least one bullet hit Hill's home, breaking glass in the front door. Shards of glass hit Hill's daughter Shanta, lacerating her forearm.

Carey v. State, Cause No. 49A05-0103-CR-85, slip op. at 2-3 (Ind. Ct. App. September 5, 2001), *trans. denied*; *Appellant's App.* at 22-23.

The State charged Carey with attempted murder against Allen. Following a jury trial, the trial court instructed the jury on attempted murder, as well as the included offenses of attempted voluntary manslaughter, aggravated battery, and battery. The jury found Carey guilty of attempted voluntary manslaughter and the trial court sentenced him to thirty-five years in prison.

Carey's appellate counsel raised three issues on direct appeal, which were rejected when the Court of Appeals found: (1) the excluded testimony of defense witnesses that the victim and acquaintances had a gun was irrelevant; (2) the lower court's handling of the jury's note was waived for failure to object; and (3) the convictions for attempted voluntary manslaughter and criminal recklessness did not violate double jeopardy prohibitions because there were two separate victims. Carey's convictions were affirmed in an unpublished decision, and our Supreme Court denied his petition to transfer.

On April 1, 2004, Carey filed a pro se PCR petition, which was amended by appointed counsel on April 12, 2005. The amended petition alleged that: (1) the trial court erred in

instructing the jury on attempted murder and attempted voluntary manslaughter without making clear that Carey must have specifically intended to kill Allen; (2) the trial court erred in failing to find sudden heat as a mitigating factor at sentencing; and (3) trial and appellate counsel were ineffective for failing to object to the jury instructions, for failing to object to the court's failure to find sudden heat as a mitigator, and for offering an instruction on attempted voluntary manslaughter that allowed the jury to reach an apparent compromise verdict for attempted voluntary manslaughter, which, like attempted murder, is a Class A felony.

Following an evidentiary hearing, the post-conviction court denied Carey's petition, concluding that Carey had waived the freestanding issues of erroneous jury instructions and improper use of sudden heat as a mitigator. As to the claim of ineffective assistance of trial counsel, the post-conviction court held that counsel subjected the State's evidence to meaningful adversarial testing and clearly performed within objective reasonable standards. *Appellant's App.* at 128. While acknowledging that counsel himself "effectively admitted his performance left something to be desired where instructing the jury was concerned," the PCR court concluded that trial counsel's actions did not rise to the level condemned in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Appellant's App.* at 128-29. Additionally, Carey presented no proof at the PCR hearing for the court to conclude that the jury returned a compromise verdict or that trial counsel's strategy to introduce the element of sudden heat was not sound, i.e., there was no evidence that Carey was prejudiced.

As to the issue of appellate counsel, the PCR court found Carey's claim of ineffective assistance to be somewhat duplicative of the charges leveled against trial counsel. Noting, "the same presumption of competence that surrounds trial counsel attaches to appellate counsel," the PCR court found that Carey failed to overcome this presumption by clear and convincing evidence. *Id*. First, the PCR court found that appellate counsel's affidavit revealed diligent review of the case and the presentation of the issues with the most likelihood of success. Second, the PCR court found that "[g]iven that the exact wording of the instructions likely would not have been deemed to be fundamental error, the court cannot find this argument establishes ineffectiveness justifying relief." *Id*. at 130. Finally, the PCR court found that, while sudden heat as a mitigator was not specifically raised during sentencing, the concept was raised in the trial court's consideration that "the victim did have some role in facilitating or participating in the offense that was committed." *Id*. at 213. The PCR court therefore denied Carey's petition for relief. *Id*. at 131. Carey now appeals.

DISCUSSION AND DECISION

Post-conviction proceedings are civil proceedings, and a petitioner must establish his claims by a preponderance of the evidence. *Stevens v. State*, 770 N.E.2d 739,745 (Ind. 2002), *cert. denied*, 540 U.S. 830, 124 S. Ct. 69, 157 L. Ed. 2d 56 (2003); *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied*, 534 U.S. 1164, 122 S. Ct. 1178, 152 L. Ed. 2d 120 (2002). Because Carey is now appealing from a negative judgment, to the extent his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction

court. *Stevens*, 770 N.E.2d at 745; *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied*, 537 U.S. 839, 123 S. Ct. 162, 154 L. Ed. 2d 61 (2002). In other words, Carey must convince this Court that there is no way within the law that the court below could have reached the decision it did. *Stevens*, 770 N.E.2d at 745; *Spranger v. State*, 650 N.E.2d 1117, 1120 (Ind. 1995).

As our Supreme Court recently stated in *Timberlake*:

> Postconviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. *Rouster v. State*, 705 N.E.2d 999, 1003 (Ind. 1999). Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the postconviction rules. P-C.R. 1(1); *Rouster*, 705 N.E.2d at 1003. If an issue was known and available but not raised on direct appeal, it is waived. *Rouster*, 705 N.E.2d at 1003. If it was raised on appeal, but decided adversely, it is res judicata. *Id.* (citing *Lowery v. State*, 640 N.E.2d 1031, 1037 (Ind. 1994)). If not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a postconviction proceeding. *Woods v. State*, 701 N.E.2d 1208, 1215 (Ind. 1998). A claim of ineffective assistance of appellate counsel is also an appropriate issue for post-conviction review. As a general rule, however, most freestanding claims of error are not available in a postconviction proceeding because of the doctrines of waiver and res judicata.

753 N.E.2d at 597-98.

Carey contends that he received ineffective assistance of counsel. We review ineffective assistance of counsel claims under the two-prong test in *Strickland v. Washington*. *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002); *Douglas v. State*, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003), *trans. denied*. First, the petitioner must demonstrate that counsel's performance was deficient because it fell below an objective standard of reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002); *Douglas*, 800 N.E.2d at

607. Second, the petitioner must demonstrate he was prejudiced by his counsel's deficient performance. *Wentz*, 766 N.E.2d at 360; *Douglas*, 800 N.E.2d at 607. To show prejudice, a petitioner must demonstrate a reasonable probability that the result of his trial would have been different if his counsel had not made the errors. *Wentz*, 766 N.E.2d at 360. A probability is reasonable if our confidence in the outcome has been undermined. *Id*.

We presume counsel provided adequate assistance, and we give deference to counsel's choice of strategy and tactics. *Smith*, 765 N.E.2d at 585; *Douglas*, 800 N.E.2d at 607. "'Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.'" *Douglas*, 800 N.E.2d at 607 (quoting *Smith*, 765 N.E.2d at 585). If we may easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient. *Wentz*, 766 N.E.2d at 360; *Douglas*, 800 N.E.2d at 607.

I. Ineffective Assistance of Trial Counsel

A. Specific Intent Instructions

The PCR court found that Carey's trial counsel was not ineffective for failing to object to the language in the attempted murder and attempted voluntary manslaughter instructions. In order to establish that counsel's failure to object to a jury instruction was ineffective assistance of counsel, Carey must first prove that a proper objection would have been sustained. *Lambert v. State*, 743 N.E.2d 719, 741 (Ind. 2001), *cert. denied*, 520 U.S. 1255, 117 S. Ct. 2417, 138 L. Ed. 2d 181 (1997); *Lloyd v. State*, 669 N.E.2d 980, 985 (Ind. 1996). Moreover, Carey "'must prove that the failure to object was unreasonable and resulted in

sufficient prejudice such that there exists a reasonable probability the outcome would have been different'" had counsel leveled an objection. *Lambert*, 743 N.E.2d at 741 (quoting *Potter v. State*, 684 N.E.2d 1127, 1132 (Ind. 1997)).

The trial court instructed the jury regarding attempted murder. On appeal, Carey contends that trial counsel was ineffective for failing to object to these instructions because they failed to make clear that, as an element of the offense, Carey must have intended to kill Allen. *See Spradlin v. State*, 569 N.E.2d 948, 951 (Ind. 1991) (in analyzing attempted murder instruction, court stated, "We hold that, by definition, there can be no 'attempt' to perform an act unless there is a simultaneous 'intent' to accomplish such act."). Carey, however, was not convicted of attempted murder. Therefore, even if the trial counsel erred in failing to object to this instruction, such error would be harmless. *Garrett v. State*, 756 N.E.2d 523, 528 (Ind. Ct. App. 2001), *trans. denied*. Without resultant prejudice to Carey, the trial court did not err in finding that Carey's trial counsel was not ineffective regarding this instruction. *See Wentz*, 766 N.E.2d at 360 (if ineffective assistance claim may be easily dismissed based upon prejudice prong, court may do so without addressing whether counsel's performance was deficient).

Carey also contends that trial counsel was ineffective for failing to object to the attempted voluntary manslaughter instruction. In this case, the jury was instructed that to convict Carey of attempted voluntary manslaughter the jury must find that he "acted with the specific intent to commit murder, that is by knowingly or intentionally shooting a deadly weapon, that is a handgun at and against the person of Michael Allen which was conduct

constituting a substantial step toward the commission of the intended crime of attempt murder." *Pet'r's Ex.* A at 85. The jury also was instructed, "intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause serious bodily injury or death and may be inferred from discharging a weapon in the direction of a victim." *Id*. at 93. These instructions adequately informed the jury of the need to find that Carey intended to kill Allen.

Furthermore, error in the attempted voluntary manslaughter instruction, if any, did not result in prejudice to Carey. There was little doubt that the shooter acted with the intent to kill—especially in light of the fact that the shooter aimed at Allen from twenty feet away and shot and hit Allen seven times while chasing him off a neighborhood porch and into a back yard. The evidence presented to the trial court required the jury to determine the identity of the shooter. Both the deputy prosecutor and defense counsel raised the issue of identity in their closing arguments. *Pet'r's Ex.* A at 414-23, 425-26. Carey has failed to demonstrate a reasonable probability that the result of his trial would have been different even if trial counsel had objected to this instruction. *Wentz*, 766 N.E.2d at 360.

B. Tendered Instruction

The PCR court also found that Carey's trial counsel was not ineffective for tendering an instruction on attempted voluntary manslaughter. On appeal, Carey contends that the PCR court erred in making this determination because the use of this instruction allowed the jury to reach a compromise verdict between attempted murder and battery. Carey also argues that

a conviction for attempted voluntary manslaughter carries the same penalty as attempted murder and, therefore, Carey did not benefit from this instruction.[3]

Contrary to Carey's contention, trial counsel's introduction of the attempted voluntary manslaughter instruction described the offense as a Class B felony. *Appellant's App.* at 184. The trial court, using the "pattern jury instructions, fashioned an attempt voluntary manslaughter" instruction describing the offense as a Class A felony if committed by means of a deadly weapon. *Id*. During a colloquy regarding the instructions, the trial court acknowledged that, while defense counsel had tendered the substance, "it's not exactly your word [sic] -- your instruction." *Id*. Thereafter, the trial court stated:

> Over the State's objection and over the defense objection, the Court believes that attempt voluntary manslaughter, with the evidence that's in front of it, is an included offense. The evidence that I have in front of me does, I think, create an issue for the jury to consider sudden heat, and I am going to give it.

Id. at 186. Trial counsel was not ineffective for submitting an instruction of attempted voluntary manslaughter as a Class B felony and objecting to the instruction as given.

Furthermore, the introduction of the attempted voluntary manslaughter instruction was a reasonable trial tactic, which allowed the introduction of evidence that Allen instigated the confrontation. This information allowed Carey to also characterize himself as a victim, thus potentially engendering jury empathy. *See Smith*, 765 N.E.2d at 585 (we give deference to

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[3] Petitioner points out an anomaly in the Indiana sentencing scheme that arises when one is charged with attempted murder by use of a deadly weapon and there is evidence of sudden heat. Attempted murder is a Class A felony. Attempted voluntary manslaughter by means of a deadly weapon is also a Class A felony. While voluntary manslaughter by means of a deadly weapon is clearly an inherently included offense of murder, attempted murder and attempted voluntary manslaughter carry the same penalty. Finding no prejudice to the defendant in this case, we do not address this issue. However, we identify this issue in the event these code sections do not properly reflect the legislature's intent.

choice of trial tactics). Trial counsel was not ineffective for tendering this instruction. The PCR court did not err in finding that trial counsel was not ineffective for tendering this instruction.

C. Sudden Heat as a Mitigator

Finally, Carey argues that trial counsel was ineffective for failing to argue at sentencing that sudden heat should be deemed a mitigator, notwithstanding its having been used to mitigate his conviction from attempted murder to attempted voluntary manslaughter. At sentencing, trial counsel requested the trial court consider the possibility that Allen facilitated the crime. The State objected, noting that the jury "took that into consideration in rendering their verdict of voluntary manslaughter." *Appellant's App.* at 205. Following the sentencing hearing, the trial court made the following findings regarding mitigators:

> I find as mitigating circumstances, again, unlike the argument made by the State, I think that the victim did have some role in facilitating or participating in the offense that was committed. I can't overlook the fact that the victim in this case was involved in a fight. I think, from the testimony that I heard, was probably the instigator of that fight. I have no doubt that that was the triggering event that led to Mr. Carey going and getting the gun and committing the act that he committed. I also find, as a mitigating circumstance, that Mr. Carey does have a child and the evidence contained in the pre-sentence report shows me that he had been attempting to make support payments for that child and that, therefore, there is some hardship that his dependent would have as a result of his [incarceration].

Id. at 213. However, in balancing the aggravators and mitigators, the trial court concluded that the aggravators slightly outweighed the mitigators. Contrary to Carey's assertion, trial

counsel raised the proper mitigator but the trial court found it carried less weight than the aggravators.

II. Ineffective Assistance of Appellate Counsel

The PCR court found that Carey's appellate counsel was not ineffective. Reiterating the same arguments used for trial counsel, Carey contends that appellate counsel was ineffective for failing to raise these trial counsel errors. Although this Court and our Supreme Court have generally considered claims of ineffective assistance of trial and appellate counsel as analogous, there are significant differences between the roles of appellate and trial counsel. *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003). Our Supreme Court has recognized three categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal; (2) failing to raise issues; and (3) failing to present issues competently. *See Timberlake*, 753 N.E.2d at 603. Only the second category applies here.

In our review of a claim of ineffective assistance of appellate counsel regarding the selection and presentation of issues, Carey must overcome the strongest presumption of adequate assistance. *Law*, 797 N.E.2d at 1162 (citing *Seeley v. State*, 782 N.E.2d 1052, 1059 (Ind. Ct. App. 2003), *trans. denied*). In determining whether appellate counsel's performance was deficient, we consider the information available in the trial record or otherwise known to appellate counsel. *Id*.

Carey's claim for ineffective assistance requires us to find that appellate counsel was ineffective for failing to raise issues that constituted trial counsel's ineffectiveness. In essence this is a claim of appellate counsel ineffectiveness balanced on top of trial counsel

error. To find ineffective assistance of appellate counsel, the PCR court had to conclude that trial counsel erred and but for the deficiency of appellate counsel, these trial counsel errors would have been revealed. As stated above, there were no trial counsel errors. Our finding that trial counsel was not ineffective mandates our conclusion that appellate counsel was also not ineffective.

Affirmed.

BAILEY, J., and CRONE, J., concur.